

No. 90-825

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Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

RICHARD JOSEPH LYNN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly dismissed petitioner's appeal because he was a fugitive.



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OPINION BELOW

The judgment order of the court of appeals (Pet. App. 1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 17, 1990. A petition for rehearing was denied on September 25, 1990. The petition for a writ of certiorari was filed on November 15, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Alabama, petitioner was con-

victed on one count of conspiring to import cocaine, in violation of 21 U.S.C. 963; on three counts of importing cocaine, in violation of 21 U.S.C. 952; on one count of conspiring to distribute cocaine and marijuana, in violation of 21 U.S.C. 846; and on two counts of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to life imprisonment. The court of appeals dismissed petitioner's appeal. Pet. App. 1.

The evidence at trial showed that from 1982 to 1989 petitioner was a participant in a major cocaine and marijuana trafficking organization. The organization purchased large quantities of the drugs in Colombia, caused the drugs to be delivered by boat and by plane to various locations in Alabama and other southeastern States, and distributed the drugs in Florida and in other States.

Petitioner was sentenced to life imprisonment and began serving his sentence on December 15, 1989. On March 27, 1990, while his appeal was pending, petitioner escaped from the Federal Correctional Institution at Talladega, Alabama. The government subsequently filed a motion to dismiss petitioner's appeal because he was a fugitive. On June 25, petitioner's counsel filed a response, asking the court to hold the government's motion to dismiss the appeal for 30 days or to enter an order prospectively dismissing the appeal after 30 days, so that petitioner could be given an opportunity to surrender. On August 17, the court of appeals dismissed petitioner's appeal. Pet. App. 1.

On August 23, petitioner's counsel filed a motion for reconsideration on the ground that counsel had diligently prepared an appellate brief that raised several viable issues. Petitioner was recaptured by the authorities on August 29. The next day, petitioner's counsel filed a supplement to the motion for reconsideration notifying the court of appeals of petitioner's recapture. The court of appeals denied peti-

tioner's motion for reconsideration of its order dismissing petitioner's appeal.

ARGUMENT

The court of appeals correctly dismissed petitioner's appeal and its action does not conflict with the decisions of any other court of appeals. Further review of petitioner's claim is therefore unwarranted.

A reviewing court is authorized to dismiss the appeal of a defendant who has become a fugitive. In *Molinero v. United States*, 396 U.S. 365 (1970), the Court dismissed the appeal of a defendant who had become a fugitive while his case was on appeal, stating that the defendant's escape "disentitles [him] to call upon the resources of the Court for determination of his claims." 396 U.S. at 366. See *United States v. Sharpe*, 470 U.S. 675, 681-682 & n.2 (1985); *United States v. Wright*, 902 F.2d 241, 242-244 (3d Cir. 1990); *United States v. Alvarez*, 868 F.2d 547, 548 (2d Cir. 1989).

A fugitive is not entitled to have his appeal reinstated if he is captured. See, e.g., *United States v. DeValle*, 894 F.2d 133, 135-136 (5th Cir. 1990); *United States v. Persico*, 853 F.2d 134, 136-138 (2d Cir. 1988); *United States v. Puzzanghera*, 820 F.2d 25, 25-27 (1st Cir.), cert. denied, 484 U.S. 900 (1987). As stated in *Puzzanghera*, a recaptured fugitive "has few if any equities to argue." 820 F.2d at 27. In *Estelle v. Dorrough*, 420 U.S. 534 (1975), this Court rejected an equal protection challenge to a state statute that required the dismissal of a fugitive's appeal if he did not voluntarily surrender within ten days of his escape. The Court stated that the statute discourages escapes, encourages voluntary surrenders, and promotes the "efficient, dignified operation" of the state reviewing court. *Id.* at 537.

Petitioner complains (Pet. 4-5) that the court of appeals did not follow the procedure of those courts of appeals that

have issued a prospective or conditional notice of dismissal if the fugitive is not returned to custody within a specified period of time—usually 30 days. See, e.g., *United States v. Sperling*, 506 F.2d 1323, 1345 n.33 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975); *United States v. Swigart*, 490 F.2d 914, 915 (10th Cir. 1973); *Brinlee v. United States*, 483 F.2d 925, 927 (8th Cir. 1973), cert. denied, 419 U.S. 878 (1974). As an initial matter, there is no requirement that a court of appeals issue such an order. See *United States v. Wright*, 902 F.2d at 243.¹

In any event, the court of appeals did not err by failing to issue such an order in this case. In his June 25 response to the government's motion to dismiss, petitioner's counsel asked the court of appeals *either* to hold the government's motion to dismiss in abeyance for 30 days *or* to enter an order prospectively dismissing the case after 30 days. The court of appeals effectively granted petitioner's first suggestion by not dismissing petitioner's appeal until August 17, which was well beyond the 30-day period petitioner requested and almost five months after petitioner had escaped. Accordingly, petitioner cannot reasonably complain about the court's actions.²

¹ Petitioner's reliance (Pet. 5) on *United States v. Snow*, 748 F.2d 928 (4th Cir. 1984), is misplaced. In *Snow*, the Fourth Circuit exercised its discretion to hear the appeal of a recaptured fugitive because he had been returned to custody within 30 days of his escape. In this case, in contrast, petitioner was not recaptured until approximately 150 days after his escape.

² In his supplemental brief, petitioner calls the Court's attention to *Katz v. United States*, No. 89-35797 (9th Cir. Dec. 11, 1990). In that case, the court of appeals agreed to hear the defendant's appeal of the denial of the motion he filed under 28 U.S.C. 2255 alleging ineffective assistance of counsel, even though the defendant had previously been a fugitive, because the defendant had been recaptured at the time that he filed the Section 2255 motion. However, the ineffective assistance

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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of counsel claim was based on his lawyer's failure to perfect an appeal, and the court rejected the ineffectiveness claim because "we would have dismissed Katz's direct appeal, if perfected, on the basis of *Molinaro* because he was then a fugitive when that appeal was pending." Slip op. 15056.